

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-219917

DATE: November 19, 1985

MATTER OF: Proffitt and Fowler

DIGEST:

1. An agency's determination of whether a proposal is in the competitive range is a matter of agency discretion which will not be disturbed absent a clear showing that the determination lacked a reasonable basis or was not consistent with the major evaluation criteria set forth in the request for proposals. Based on the much higher technical evaluation scores of other proposals GAO will not disturb agency's decision to exclude the protester from the competitive range on the basis that it did not have any reasonable chance of being selected for award.
2. Where protester's initial proposal was properly determined to be outside the competitive range, the agency was not obligated to enter into discussions with the protester regarding technical deficiencies in its proposal.
3. Once the protester's proposal was determined to be outside of the competitive range as a result of the technical evaluation of its proposal, the potentially lower price which that offer might provide is irrelevant since an offer not within the competitive range cannot be considered for award.
4. Mere allegations by the protester do not meet its heavy burden of proof that the agency's decision to make award to another offeror was the result of bias or bad faith on the part of the agency.
5. Protest on the basis that agency failed to advise protester of its right to file protest with GAO is dismissed as academic where the protester timely filed a protest with GAO.

Proffitt and Fowler, Counsellors at Law, protests award to Arthur Andersen and Co. under request for proposals (RFP) No. HHS-DAS-85-20, issued by the Department of Health and Human Services.

The protest is denied in part and dismissed in part.

On February 15, 1985, the Dallas Regional Office of the Department of Health and Human Services issued an RFP for the development and presentation of a management development training program for managers and supervisors in that region. The agency received 32 proposals by the March 19, 1985, deadline for receipt of initial proposals, and negotiations were then conducted with the seven offerors who were determined to be in the competitive range based on the technical evaluation and cost. The record shows that the seven offerors in the competitive range were those whose proposals received the highest point scores in the agency's technical evaluation of proposals with scores ranging from 70.7 to 88 out of a possible 100 points. The initial proposal which received the highest technical ranking was submitted by Andersen at a price of \$184,993. Excluded from the competitive range were those proposals ranked 8 through 32 in the technical evaluation, with scores ranging from 64.7 to 13.7. Among the proposals excluded from the competitive range was that of Proffitt which, with a technical score of 45, ranked 19 out of the 32 proposals in the technical evaluation. Proffitt's proposal was at a price of \$93,093. Thirteen higher ranked firms offered lower prices. On June 17, 1985, award was made to Andersen on the basis of its best and final proposal, which was rated highest technically, with a score of 93 points, and was at a price of \$99,500.

Proffitt protests award to Andersen on the basis that the agency's technical evaluation of Proffitt's proposal was improper and because its proposal was "at a more reasonable price" than Andersen's.

The agency points out that its award to Andersen, which submitted the highest-ranked initial and best and final proposals was consistent with the terms of the solicitation. Specifically, the agency points to the following paragraph set forth at part IV, section "K" of the solicitation which states:

"Paramount consideration will be given to the evaluation of technical proposals rather than cost or price. Thus submission of the lowest fixed price proposal will not in itself assure award. In addition, a proposal meeting minimum requirements with the lowest price may not be chosen for award if a higher priced proposal contains sufficiently greater technical merit to justify the additional expenditure."

Proffitt contends that its proposal should have received a higher technical score than Andersen's since each instructor which Proffitt named in its proposal has a doctorate in the field of management science whereas it understands that the instructors offered by Andersen have "only" bachelor's or master's degrees. The agency responds that the RFP's evaluation criteria do not require that instructors have any specific degrees and that, in any event, it did not consider the instructors proposed by Proffitt to be better qualified than those proposed by Andersen.

It is not the function of our Office to evaluate technical proposals de novo or resolve disputes over the scoring of technical proposals. Rather, we will examine an agency's evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria. Potomac Scheduling Co., et al., B-213927, et al., Aug. 13, 1984, 84-2 C.P.D. ¶ 162 at 4. The determination of the relative merits of a proposal, particularly with respect to technical considerations, is primarily a matter of administrative discretion, which we will not disturb unless it is shown to be arbitrary or in violation of the procurement laws or regulations. Zuni Cultural Resource Enterprise, B-208824, Jan. 17, 1983, 83-1 C.P.D. ¶ 45. Moreover, the protester bears the burden of clearly establishing that an evaluation was unreasonable. ATI Industries, B-215933, Nov. 19, 1984, 84-2 C.P.D. ¶ 540 at 5.

We do not believe that the protester has shown that the agency's technical evaluation of its proposal was unreasonable. While Proffitt has alleged the superior academic credentials of its proposed instructors, section "L" of the solicitation which sets forth the technical proposal evaluation criteria shows that the degrees held by the personnel who would provide the training were not identified as an

evaluation factor; rather, the evaluation criteria stated that the proposals would be evaluated in the category of "Qualifications of Personnel Providing Training" and emphasized the factors of relevant training experience, including training experience in the federal sector. We note that Proffitt's proposal indicates that only one of its four proposed instructors has experience in providing training services in the federal sector, whereas Andersen's technical proposal shows that more than half the personnel proposed by Andersen have prior experience in providing training in the federal sector. We also note that four of the ten Andersen employees identified in the proposal as being involved with the development and/or delivery of the management training course have doctorates and that five of the six remaining employees have advanced degrees. Thus, Proffitt received a significantly lower evaluation score than Andersen in this area of the technical evaluation. In any event, even if the agency's technical evaluation had accorded Proffitt's proposal with maximum credit--25 points--for the evaluation factor relating to the qualifications of the training personnel, Proffitt's technical score would have been increased to 61 points, still well below the minimum score in the competitive range established by the agency and substantially below Andersen's initial technical evaluation score of 88 points.

To the extent that Proffitt's protest may be regarded as a contention that the educational level of the training personnel should have been a significant evaluation factor, the protest is untimely. Protests which are based on alleged improprieties apparent on the face of a solicitation must be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1985).

Proffitt also objects to the exclusion of its initial proposal from the competitive range and contends that the agency should have conducted extensive negotiations with it so that it could have remedied any technical deficiencies in its proposal. The protester points out that the wide difference between Anderson's initial and final price--\$184,993 reduced to \$99,500--indicates that extensive negotiations occurred. It is well established that the determination of whether a proposal should be included in the competitive range is a matter primarily within the contracting agency's discretion. Thus, we will not disturb an agency's initial determination as to whether a proposal is in the competitive range unless there is clear evidence that

the determination lacked a reasonable basis. Leo Kanner Associates, B-213520, Mar. 13, 1984, 84-1 C.P.D. ¶ 299. Generally, proposals considered within the competitive range are those which are technically acceptable or reasonably susceptible of being made acceptable through discussions-- that is, proposals which have a reasonable chance of being selected for award. See D-K Associates, Inc., B-213417, Apr. 9, 1984, 84-1 C.P.D. ¶ 396. However, even a proposal which is technically acceptable or susceptible of being made acceptable may be excluded from the competitive range if, based upon the array of scores actually obtained, it does not stand a real chance of being selected for award. Leo Kanner Associates, B-213520, supra, 84-1 C.P.D. ¶ 299 at 6, and Cosmos Engineers, Inc., B-218318, May 1, 1985, 85-1 C.P.D. ¶ 491.

The record shows that there was a considerable disparity between Proffitt's technical point score of 45 and the scores of the seven initial proposals which were deemed to be within the competitive range--70.7 up to 88. In view of this wide disparity, particularly where the solicitation provided that the technical evaluation and not price would be of paramount importance, we believe that the agency properly determined that Proffitt's proposal was outside the competitive range. Furthermore, since Proffitt was not in the competitive range the agency was not required to enter into discussions with it concerning any technical deficiencies in its proposal. See CBM Electronic Systems, Inc., B-215679, Jan. 2, 1985, 85-1 C.P.D. ¶ 7; see also Leo Kanner Associates, B-213520, supra, 84-1 C.P.D. ¶ 299 at 7.

Proffitt also objects to the award to Andersen on the basis that Andersen's best and final offer at a price of \$99,500 is higher than the price set forth by Proffitt in its initial proposal--\$93,093. However, we have held that once a proposal is determined to be outside of the competitive range as a result of the technical evaluation, the potentially lower price which that offer might provide is irrelevant since an offer not within the competitive range cannot be considered for award. See Advanced ElectroMagnetics, Inc., B-208271, Apr. 5, 1983, 83-1 C.P.D. ¶ 360 at 6.

The protester also alleges that the procurement process for this procurement was a "farce" and that from the outset the agency had every intention of making award to Andersen.

A showing of bad faith or bias requires undeniable or irrefutable proof that the agency had a malicious and specific intent to injure the party alleging bad faith, and our Office will not find an agency's discretionary action to be biased or arbitrary if the record indicates a reasonable basis for such action. Nuclear Assurance Corp., B-216076, Jan. 24, 1985, 85-1 C.P.D. ¶ 94 at 5. Proffitt has not produced any evidence which would meet its heavy burden of proof that the agency acted on the basis of bad faith or bias in its decision to make award to Andersen.

Finally, Proffitt protests that the contracting officer, in her August 8, 1985 letter denying Proffitt's protest to the agency did not advise Proffitt of its right to file a protest with our Office. The agency contracting officer states that she did not inform Proffitt of its right to file a protest with our Office because the protester had informed her that it was familiar with the protest procedures. However, Proffitt has not been adversely affected in any way by the agency's failure to advise it of the right to submit a protest with this Office since Proffitt timely submitted its protest to our Office. Therefore, this issue is dismissed as academic. See Harris Corp., B-218930, July 2, 1985, 85-2 C.P.D. ¶ 17.

Accordingly, the protest is dismissed in part and denied in part.

for *Seymour E. Efron*
 Harry R. Van Cleave
 General Counsel